Due service and receipt of a copy of the within is hereby admitted

this_____day of May, 1929.

_____

Attorney General of the State of California,

_____

Deputy Attorney General of the State of California,
Solicitors for Appellee.

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CHARLES ELMORE CRO
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, as Chief of Division of Motor Vehicles,
Appellee.

BRIEF FOR APPELLANTS.

W. R. CRAWFORD,
Call Building, San Francisco, California,
J. F. VIZZARD,
Call Building, San Francisco, California,
EDWIN C. EWING,
L. C. Smith Building, Seattle, Washington,
Solicitors for Appellants.

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In the Supreme Court
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OCTOBER TERM, 1929

No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, as Chief of Division of Motor Vehicles,
Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

Plaintiffs brought the complaint on behalf of themselves and on behalf of all persons, firms, associations and corporations similarly interested or situated and entitled to receive the benefits herein, against Frank G. Snook, as Chief of the Division of Motor Vehicles of California, defendant. (R. 1, 2.) The plaintiffs have for years last past and now are operating motor

vehicles exclusively within the limits of incorporated cities in the state, and said motor vehicles do not use any public highway, except the said streets; the plaintiffs must use said motor vehicles on said streets in order to carry on their business. (R. 3.)

The State of California enacted the "California Vehicle Act" being Chapter 226, Statutes of 1923, as amended by Chapter 240, Statutes of 1925, and by Chapters 752, 844 and 864, Statutes of 1927. The defendant has the sole jurisdiction, and it is his duty to enforce all the provisions of said act. (R. 29, 30, 37.) Every owner of a motor vehicle, trailer or semi-trailer is compelled to register the vehicle. The correct fees must be paid or any owner will be punished by a fine or imprisonment or both, and also the defendant can seize the vehicle and sell the same. The registration fee is $3.00 per year on each vehicle, being subdivision (a) of Section 77; every electric vehicle must pay a fee, in addition to said $3.00, of $10.00, and if said electric vehicle is used for passengers for hire or for transporting property must pay in advance from $50.00 to $90.00, depending upon the weight, being subdivision (b) of said Section 77; by subdivision (c) of said Section 77, every owner must pay in advance, in addition to said $3.00, from $15.00 to $70.00, depending upon the weight of every motor vehicle which is used for transporting passengers for hire or for transporting property. Vehicles not equipped wholly with pneumatic tires must pay twice the said fees in said subdivision (c) or fees of from $30.00 to $140.00 per vehicle; also fees are charged manufacturers and dealers, for duplicate

plates or certificates and for owners and chauffeurs. Counties and cities have power to regulate vehicles and to license the same. The defendant shall deposit in the State Treasury to the credit of the motor vehicle fund all moneys collected during the preceding day. A motor vehicle fund was created. From said motor vehicle fund not more than 25 per cent can be used for regulation and expenses, and one-half of the balance of said funds is paid over to the counties in proportion to the number of vehicles registered in said counties and the state receives the balance. The counties must expend all of said moneys exclusively in the construction and maintenance of public roads, bridges and culverts in said counties, and the state's share must be expended solely for the maintenance, repair, widening, resurfacing and reconstructing of state highways. (R. 3, 4, 5.) The Supreme Court of California has interpreted the said subdivisions (b) and (c), as aforesaid, and declared the sole purpose was to exact said charges on motor vehicles using the public highways, so as to raise funds to improve and repair said highways, and that the money so collected was a charge for the use of said highways by vehicles transporting passengers for hire or transporting property. (See *Old Homestead Bakery v. Marsh,* (242 Pac. 749) (75 Cal. App. 247) affirmed by the Supreme Court.) That such exactions, being charges for the use of said highways, are "tolls." (R. 5.)

The cities have enacted ordinances for the purpose of charging those vehicles, trailers and semi-trailers which transport passengers for hire or property for the cost of regulation and for revenue before they

can use said streets, in addition to charges under the said subdivisions (b) and (c) of said Section 77. Said annual charges vary from $5.00 to $42.00, depending upon the city. Seventy-five per cent of the moneys so collected has been and will be applied to maintenance and repair of said streets. (R. 5, 6.)

Said plaintiffs and said others must pay said state exactions before January 31, 1929, before they can use the said streets by the said vehicles, in order to escape said fines or imprisonment, or both, together with the seizure of said equipment and sale thereof, and moreover, their business will be destroyed at their irreparable loss, damage and injury. Said defendant, solely under color of his office, as aforesaid, threatens to and will enforce said provisions of said "California Vehicle Act," especially said unconstitutional subdivisions (b) and (c) of said Section 77, against the plaintiffs and all others similarly interested or situated, unless restrained by the order of the Court. (R. 6.)

Said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 266, Statutes of 1923, as amended, and said actions of the defendant in enforcing said illegal subdivisions (b) and (c), as aforesaid, were void and unconstitutional, being contrary to and in violation of the Constitution of the United States, especially the Fourteenth Amendment thereof and the Constitution of the State of California, the protection of all of which the plaintiffs and all said others similarly interested or situated pray. (R. 6.) Plaintiffs and all said others

have no plain, adequate and complete remedy at law. (R. 6, 7.)

The matters involved exceed in value the sum of $3000.00, exclusive of interest and costs. (R. 7.)

Plaintiffs and all said others pray for an interlocutory injunction restraining the defendant, as aforesaid, from in any way or manner enforcing or threatening to enforce said subdivisions (b) and (c) of said Section 77 of the "California Vehicle Act," as aforesaid, and that the Court will proceed to call in two additional Judges, one of whom to be a Circuit Judge, for the purpose of hearing and determining the application for said interlocutory injunction under the provisions of Section 266, as amended, of the Judicial Code, and further upon the final hearing thereof said Statutory Court hear and determine that said subdivisions (b) and (c), as aforesaid, are void and unconstitutional, and that said defendant be forever enjoined and permanently restrained from enforcing said illegal, void and unconstitutional subdivisions (b) and (c) of said Section 77, as aforesaid, and further for all other, proper and further relief that may be just and equitable in the premises, and for costs and disbursements. (R. 7, 8.)

Said motion with affidavit for an interlocutory injunction was filed and presented to the Court on the same day the bill of complaint was filed, to wit, December 29, 1928. The affidavit shows: that during the year of 1928 the defendant had collected more than $5,000,000.00 from subdivision (a) from the registration fees, and more than $2,668,000.00 from sub-

divisions (b) and (c), and more than $400,000.00 from the fees of chauffeurs and owners; that defendant could not expend more than 25% of the money so collected and more than $6,000,000.00 will be divided equally between the counties and the state; that all of the money received by the state, as aforesaid will be expended in the maintenance and repair of the Federal Aided Highways, and the counties' share will be expended on the maintenance and repair of county roads; that during the year 1929 by reason of said amendment of Section 77, the collections from said subdivisions (b) and (c), the defendant will collect more than $2,000,000.00 in addition to the collections during the year 1928; that the plaintiffs and all others similarly interested or situated will pay at least 75% of the funds collected from said subdivisions (b) and (c). (R. 8, 9, 10.)

Proper notice of the hearing on said motion before the Statutory Court was served upon the Governor, the Attorney General and Frank G. Snook, defendant. (R. 10, 11.)

Plaintiffs on behalf of themselves and all said others made an application for a restraining order commanding and directing the defendant from enforcing or threatening to enforce said subdivisions (b) and (c), as aforesaid, until the hearing and determination of the hearing on the motion for an interlocutory injunction. Motion was based upon the record and affidavit in support. (R. 11, 12, 13.)

The Court on January 30, 1929, granting said restraining order finds that irreparable damage would follow unless the order was granted, and by said re-

straining order the defendant could not expend, disburse or deposit in the State Treasury all moneys collected from said subdivisions (b) and (c), aforesaid, but all said money shall be held intact, subject to any order to be made thereafter, and until the hearing and determination of said motion for said interlocutory injunction to be heard on February 6, 1929. (R. 14.)

The defendant on January 25, 1929, filed a motion to dismiss the bill of complaint. (R. 14, 15.)

On February 13, 1929, the said Statutory Court filed its opinion. The following excerpts show that, "The plaintiff * * * operating motor vehicles exclusively within the limits of incorporated cities of the state and make no use of the highways of the state, except the streets of the cities in which they operate. The defendant is Chief of the Division of Motor Vehicles in the state and by virtue of his office is charged with the duty of enforcing the provisions of the Motor Vehicle Act. Section 77a of the Act prescribes a registration fee of $3.00 for the registration of every vehicle, trailer or semi-trailer, except those which are exempt by the Act, to be paid at the time application is made for registration. Section 77b prescribes an additional registration fee for the registration of every electric motor vehicle designed, used, or maintained primarily for the transportation of passengers for hire or for the transportation of property; the additional fee varies from $50.00 to $90.00 depending upon the weight of the vehicle. Section 77c prescribes an additional registration fee for the registration of vehicles, including

trailers and semi-trailers, designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property; the additional fee varying from $20.00 to $70.00, depending upon the weight of the vehicle; but the additional fee prescribed by this subsection need not be paid for electric vehicles. Section 51 declared it shall be unlawful and constitute a misdeameanor for any person to operate * * * any motor vehicle, trailer or semi-trailer upon a public highway, which shall not be registered, or for which the registration fees have not been paid, when as required by the provisions of the Act. Section 21 defines public highway * * * Section 159 of the Act creates in the State Treasury a Motor Vehicle Fund in which is deposited all moneys received from registration fees and some other sources. One half the net receipts from this fund is appropriated and authorized to be paid from the Motor Vehicle Fund to the counties of the state in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration certificates are issued * * *. In addition to the foregoing fees, the complaint avers that the incorporated cities of the state have enacted ordinances exacting license taxes and fees on motor vehicles, trailers and semi-trailers using the streets of the cities for transportation of passengers or property for hire; the amount of the tax or fee varying from $5.00 to $42.00 per motor in the different cities.

The plaintiffs challenge the validity of those portions of the Act imposing a tax or registration fee on

the vehicles owned and operated by them within the corporate limits of the several municipalities of the state on the ground that the fee is in the nature of a toll for the use of the highways, and inasmuch as the plaintiffs make no use of the highways outside of the municipalities and are taxed for such use by the municipalities the exaction of the state violates the Fourteenth Amendment to the Constitution of the United States. This broad contention cannot be sustained. In the lawful exercise of its acknowledged police power, the states may, beyond question, exact registration fees from owners and users of motor vehicles, varying with their horsepower or weight, regardless of the extent or place of use, so long as the vehicles are or may be used on public highways of the state."

The opinion cited two cases, one *Hendrick v. Maryland*, 235 U. S. 410-412, and the other *Kane v. New Jersey*, 242 U. S. 160-7.

> "For these reasons we are of the opinion that, the registration fee imposed by the state is a vaild exercise of the police power of the state and violates no provisions of the Constitution of the United States. Whether the fee or tax imposed by the municipalities for the like use is valid or not, we need not inquire because its validity is not questioned.
>
> The decree or order heretofore entered granting a preliminary injunction, is therefore dissolved and the bill of complaint is dismissed for want of equity.
>
> Let the decree be entered accordingly." (R. 16, 17, 18, 19.)

On same day, to wit, February 13, 1929, the Statutory Court entered on order reciting:

"that said application for an injunction be and the same is hereby denied; the preliminary injunction heretofore issued herein is and the same is hereby dissolved, and motion to dismiss be and the same is hereby granted and the cause dismissed. Further ordered that a decree be signed, filed and in form as substituted, dismissing cause and for costs." (R. 19.) A decree "it was ordered, adjudged and decreed as follows, viz:

1. That the preliminary injunction heretofore granted and issued in the above entitled cause be and the same is hereby dissolved.

2. That the bill of complaint herein be and the same is hereby dismissed for want of equity.

3. That the defendant have and recover of and from the plaintiffs his costs to be taxed and the execution issued therefore." (R. 20.)

On February 23, 1929, plaintiffs served on the defendant a motion to amend together with a proposed amended bill of complaint to be heard on February 25, 1929. (R. 28.)

Said motion to file and amended bill of complaint was filed. (R. 20, 21.)

The said proposed amended bill of complaint contained similar averments in the bill of complaint and also shows: That Congress had enacted on July 11, 1916, the "Rural Post Act." The State of California in 1917 had assented to and agreed to abide by the provisions of said "Rural Post Act." Thereafter in 1921 Congress amended and supplemented said Act by the "Federal Highway Act." The Federal Government has since 1917 paid over to said state many millions of dollars under said Acts for the construction or reconstruction of highways and in the future will pay additional millions. That said Federal money

has been expended on the highways of the state or county roads for the construction or reconstruction of portions of said highways. Every state highway or county road is a rural post road and comes within the provisions of said Federal Acts. One of said provisions provided:

> "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds." (R. 21, 22.)

"California Vehicle Act" of 1923 was amended by Chapter 844, Statute of 1927. All owners must make an application for registration showing whether the vehicle, trailer or semi-trailer is for private use or for the transportation of passengers for hire, or for transportation of property, or exempted by the Act. Every vehicle, trailer or semi-trailer must pay $3.00 per year under subdivision (a) of said Section 77, as aforesaid; and every electric vehicle must pay $3.00 and $10.00 additional when for private use, but if said electric vehicle is used for the transportation of passengers for hire or for the transportation of property another additional fee was exacted according to the following schedule: less than 6000 pounds, $50.00; less than 10,000 pounds, $70.00; 10,000 pounds or over, $80.00; as provided for in subdivision (b), as aforesaid. Subdivision (c), as aforesaid, provides that in addition to said $3.00 registration fee every motor vehicle, trailer or semi-trailer, except electric vehicles used for the transportation of passengers for hire or for the transportation of property, must pay an additional fee according to the following table:

> "When such vehicles are equipped wholly with pneumatic tires"—"unladen, three thousand

> pounds or more and less than six thousand pounds, $15.00;" unladen 6000 pounds or more, but less than 10,000 pounds and limited to a total weight, including vehicle and load, not to exceeding 22,000 pounds, $40.00; unladen, 10,000 pounds or more, a total weight, including vehicle and load, not exceeding 22,000 pounds, $50.00; unladen, 6000 pounds or more and a total weight, including vehicle and load, in excess of 22,000 pounds, $70.00."

When pneumatic tires are not used, then said fees are doubled. Said amendment went into force and effect for the year 1929, and the fees provided for in subdivision (b) were increased 25%, while the fees in subdivision (c) were increased about 250%, and further said amendment repealed the clause in subdivision (c), to wit:

> "For each such vehicle weighing, when unladen, less than 3000 pounds $10.00."

By such amendment many thousands of vehicles transporting passeengers for hire or property have been freed from said fees, although said vehicles weigh more than 6000 pounds when loaded. Every vehicle, trailer and semi-trailer coming within the provisions of said subdivisions (b) and (c) must have special number plates. Defendant collected about $5,200,000.00 from subdivision (a) for 1928, and plaintiffs and all said others, except those exempted were forced to pay in advance said amount, and in addition collected about $2,668,000.00 from said subdivisions (b) and (c). That the entire cost for enforcing and regulating said "California Vehicle Act" was less than $1,700,000.00 and about $6,000,000.00, the

net proceeds, will be equally divided between the state and counties. (R. 22, 23, 24.)

The Supreme Court of California has interpreted said subdivisions (b) and (c), as aforesaid, and declared that the whole purpose was to create a fund to maintain and repair the highways outside of the limits of cities and to receive compensation for the use of said highways by motor vehicles. Said fees are exacted as revenue measures. The plaintiffs allege said fees exacted under said subdivisions (b) and (c), as aforesaid, are "tolls," prohibited by said Federal Aid Legislation and further every cent collected has been expended for the maintenance and repair of said Federal Aided Highways. (R. 9, 25.) The cities have enacted ordinances exacting fees on motor vehicles, trailers and semi-trailers transporting passengers for hire or property using their streets. Said fees vary from $5.00 to $250.00, according to weight and depending upon the city. Said fees were enacted for the purpose of regulation and for revenue. The cost of regulation is about 25% of the money collected, and 75% is expended for the maintenance and repair of said streets. All said fees charged are in addition to fees charged under said subdivisions (b) and (c), as aforesaid. (R. 5, 6, 25.) Plaintiffs are taxpayers and offered to pay said registration fee of $3.00 under subdivision (a), as aforesaid, but the defendant has refused to accept said money, unless they pay in addition the charges in said subdivisions (b) and (c), as aforesaid. Plaintiffs and said others use exclusively the streets of cities and have paid to said cities, as aforesaid, said "tolls" for the privilege of using said

streets. (R. 5, 25, 26.) Plaintiffs must pay on or before January 31, 1929, said fees in said subdivisions (b) and (c) of said Section 77 to obtain said special number plates before using said streets, or they will be fined or imprisoned, or both, and their vehicles seized and sold as threatened by the defendant; and they will be compelled to in the future buy additional vehicles in order to take care of their business and will be forced to pay said fees on their additional vehicles. (R. 4, 6, 26.)

The defendant, under coler of his office, will collect during the year 1929 at least $4,000,000.00 alone from said fees exacted by said subdivisions (b) and (c) of said Section 77, and will issue said number plates; 75% of said amount so collected from these plaintiffs and those persons, firms, associations and corporations similarly interested or situated who operate their vehicles exclusively on the streets of cities; the defendant will not and cannot collect any fee from any owner or operator of a vehicle weighing, unladen, less than 3000 pounds, no matter if the weight of the vehicle and load exceed 6000 pounds, and he will not and cannot issue said number plates; there are many thousands of vehicles transporting passengers for hire or transporting property that are relieved from said fees. (R. 4, 26.)

Plaintiffs and said others allege that the enforcement of said unconstitutional subdivisions (b) and (c), as aforesaid, by said defendant, will not only cause said plaintiffs and said others irreparable loss and damage, but also their business will be irreparably destroyed by said thousands of vehicles without

the payment of any of said fees being in direct competition with the plaintiffs and said others; also the money so collected is expended on said Federal Aided Highways for the owners of land adjacent to said highways to the irreparable loss and injury of said plaintiffs and said others who receive no benefit from such expenditures. (R. 6, 26, 27.) The plaintiffs and said others allege that said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," Chapter 266, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, and the actions of the defendant, as Chief of the Division of Motor Vehicles, in enforcing said illegal subdivisions (b) and (c), as aforesaid, are unconstitutional and void being contrary to and in violation of the 14th Amendment of the Federal Constitution, as well as the Constitution of the State of California, prohibiting the making or enforcement of any law which shall abridge the privileges and immunities of citizens, or which shall deprive any persons of life, liberty or property without due process of law, or denies to any person the equal protection of all of which the plaintiffs and all said others pray. (R. 6, 27.)

On March 25, 1929, said Statutory Court filed an order in which it "was ordered that the motion to set aside the decree be and the same is hereby denied."

A proper appeal was perfected to this Court. (R. 29, 30.)

SPECIFICATION OF ERRORS.

I.

The Court erred in dissolving the preliminary injunction.

II.

The Court erred in refusing and denying the application for an interlocutory injunction.

III.

The Court erred in granting the motion to dismiss the bill of complaint and dismissing the bill of complaint.

IV.

The Court erred in deciding that subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 226, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, are police measures.

V.

The Court erred in refusing to be bound by the meaning of said provisions of said subdivisions (b) and (c) of Section 77 of the said "California Vehicle Act" as interpreted by the Supreme Court of California.

VI.

The Court erred in refusing to decide that the exactions under said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act" being Chapter 266, Statutes of 1923, as amended by Chapter 884, Statutes of 1927, were "tolls."

VII.

The Court erred in deciding that said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 266, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, and the acts and threatened acts of the defendant in enforcing said subdivisions do not violate any provisions of the Constitution of the United States, but that the said subdivisions and said acts are constitutional and legal.

VIII.

The Court erred in refusing to take into consideration that the plaintiffs and all others similarly interested or situated are now operating their vehicles carrying passengers for hire or property and must operate said vehicles in order to carry on their business; and their said vehicles do not operate on any public highways outside of cities, but they operate exclusively within the limits of cities using the streets thereof.

IX.

The Court erred in refusing to decide that the plaintiffs and all others similarly interested or situated must pay in advance the amount of money called for under said subdivisions (b) and (c) of Section 77 of said "California Vehicle Act" before they can use the streets of cities by their vehicles. Further all of said amount of money was collected by said defendant so as to create a fund to improve and repair the public highways outside of the limits of cities and said exactions under said subdivisions are "tolls."

X.

The Court erred in refusing to decide that the cities have enacted ordinances exacting license fees, depending upon the weight, on motor vehicles, trailers and semi-trailers transporting passengers for hire and property using the streets which said ordinances are constitutional, being protected by the Constitution of the State, as interpreted by the State Supreme Court. Said ordinances were enacted to create funds to pay the cost of regulating said motor vehicles and also for revenue; and that 75% of the proceeds derived therefrom is used for the maintenance and repair of said streets; and said license fees are "tolls."

XI.

The Court erred in refusing to protect the plaintiffs and all said others in the use of their vehicles in transporting passengers for hire or property exclusively on the streets of cities; against the enforcement of said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," in order to escape heavy fines or imprisonments or both, and the seizure of their vehicles, as said subdivisions (b) and (c), as aforesaid, are unconstitutional.

XII.

The Court erred in refusing to decide that said subdivisions (b) and (c), as aforesaid, and the acts of the defendant in enforcing the same were unconstitutional and void, being contrary to and in violation of the due process and equal protection clauses of the 14th Amendment of the Federal Constitution, as well as the State Constitution.

XIII.

The Court erred in refusing to permit the plaintiffs to file and present an amended bill of complaint in order to allege the matters set out in the affidavit in support of the motion for the interlocutory injunction and also to show that only $1,700,000.00 was the cost of the regulation which sum was less than 20% of the amount collected under said subdivisions A, B and C; also to show that there are many thousands of motor vehicles, trailers and semi-trailers whose weight, when unladen, being less than 3000 pounds are freed from the payment of said exactions provided for in said subdivision C even though their weight, when laden, exceeds 6000 pounds; that the owners and operators of said vehicles weighing unladen less than 3000 pounds are in direct competition with the plaintiffs and all others similarly interested or situated; that the plaintiffs and said others are being daily damaged and their businesses will be irreparably damaged by said competition; that all of the net proceeds of the said money so collected are expended on the Federal Aided Highways for the benefit of the owners of the land adjacent to those highways and that the plaintiffs and all said others received no benefit from the said expenditures.

ARGUMENT.

I.

THE APPELLANTS INSTITUTED THE ACTION ON BEHALF OF THEMSELVES AND ON BEHALF OF OTHERS SIMILARLY INTERESTED OR SITUATED. A CLASS SUIT.

The appellants have been and now are using the vehicles mentioned in paragraph 1 (R. 2, 3), so as to carry on their business and said vehicles transporting passengers for hire or transporting property do not use any public highway, except the streets of the incorporated cities. The appellants instituted this action on behalf of themselves and also on behalf of the owners or operators of the many thousands of vehicles, trailers and semi-trailers operated exclusively within the limits of incorporated cities transporting passengers for hire or transporting property who must use said streets in order to carry on their business. (R. 6, 7.)

Rule 38 of Equity Rules of Supreme Court.

II.

THE CHARGES TO BE COLLECTED IN ADVANCE BY THE APPELLEE UNDER THE PROVISIONS OF SUBDIVISIONS (B) AND (C) OF SECTION 77 OF THE "CALIFORNIA VEHICLE ACT," AS AMENDED, ARE "TOLLS."

The sole purpose of said provisions of said subdivisions (b) and (c) of said Section 77 was to raise funds with which the highways may be constructed, improved and repaired. The following excerpts show that the California Courts have interpreted said provisions:

"Of course the purpose of the legislation exacting license taxes for motor vehicles operated over the public highways is to raise funds with which such highways may be improved and kept in repair in such manner as suitable to the mode of transportation peculiar to motor vehicles. The theory of such a tax, particularly under present day conditions as the character of the highways required and the great expense in constructing and maintaining them, is, manifestly, that it is only just and proper that those who use the public highways either for business purposes or for pleasure should bear the expense of keeping in repair those already improved * * *, and to contribute to the construction of new roads * * *, the burden thus imposed upon motor vehicles or the owners and operators thereof, considering, of course, the particular use which such vehicles are put, their weight, and such other elements as might properly enter into determination of the probable effect, as to the matter of 'wear and tear,' the use of each of the various classes the various vehicles would have upon the roads. * * *

"The expense of maintaining the public highways from the greatly increased use and consequently wear and tear to which thus the highways now are and have been subjected, has of necessity proportionately been increased, and, must naturally, if, * * * the greatly enhanced cost of improving and keeping in proper repair the highways * * *, in bearing the burden necessarily coincident with the work of improving and maintaining the public highways * * *."

Old Homestead Bakery v. Marsh, 75 Cal. App. 247, 242 Pac. 749;

This case was affirmed by the Supreme Court on January 24, 1926.

The Supreme Court of California has held that a turn pike company can charge tolls for the cost of

construction and the Supreme Court in its opinion said:

> "All the interest that the company had in the matter was by reason of the fact that it had the right and power to collect tolls on the line of the road, as a compensation for the public service it had performed by opening a public road for the public good. In legal theory, "A turnpike is a public highway, established by public authority for public uses, and is to be regarded as a public easement, and not as private property. The only difference between this and the common highway is, that instead of being made at the expense in the first instance; and the cost of construction and maintenance is reimbursed by a toll levied by public authority for this purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other public highway." (Commonwealth v. Wilkinson, 16 Pick. 176.)"
>
> *Wood et al. v. Truckee Turnpike Company,* 24 Cal. 474, 490.

The Supreme Court in an opinion said:

> "If the Legislature may allow the taking of tolls as a compensation for building a road, it seems necessarily to follow that it may allow a like franchise as compensation for keeping it in repair—which is the purport of the statute now under view, and such is the rule, although the result may be to take away a previous right in the public to pass toll free."
>
> *Blood v. McCarty,* 112 Cal. 561, 564.

The Supreme Court of California in the *Matter of Application of Schuler,* 167 Cal. 282, in interpreting the "Motor Vehicle Act" approved May 31, 1913, said that two of the cases cited would be followed, one the case of *Kane v. State,* 81 N. J. L. 594, 80 Atl. 453.

The other was the case of *Fort Smith v. Scruggs,* 70 Ark. 549, 69 S. W. 679.

We cited the following excerpt in the *Kane* case:

> "A state may do these things because, having expended moneys, either itself or by the agencies created by it, in increasing the facilities which commerce, either interstate or intrastate, may be carried on, it is entitled to charge a fair remuneration for the outlay made by it, and for the maintenance of the public works it has constructed.
>
> "A very ordinary example of the exercise of this power is the construction of public roads known as turnpikes by agencies created by the state, for the use of which tolls are permitted to be charged to persons using the same. Such public roads are open to the use of every person desiring to travel upon them upon payment of the tolls authorized to be charged.
>
> "Although, ordinarily, turnpikes are built and owned by corporations created by the state, for the purpose of constructing and maintaining them, what the state may do indirectly through such agencies it may do directly; that is, it may itself lay out and construct such improved public roads, and charge reasonable tolls to all persons using the same, without regard to the character of the business for which they are being used. And this is practically what New Jersey is now doing."
>
> *Kane v. State,* 81 N. J. L. 594, 80 Atl. 453.

The Supreme Court of the United States affirmed the judgment of the New Jersey Court that registration fees were exacted as "tolls."

> *Kane v. New Jersey,* 248 U. S. 160, 61 L. Ed. 222.

The other case cited in the *Schuler* case is one that arose in Arkansas on a license ordinance. The Supreme Court of the state held the ordinance was a license fee, a toll. The following excerpt in the opinion:

> "The license fee imposed is, then, not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed."
>
> *Ft. Smith v. Scruggs,* 70 Ark. 549, 69 S. W. 679.

The above decisions of the State Supreme Court show: The sole purpose of the subdivisions (b) and (c), as aforesaid, was to receive compensation for the use of public highways by motor vehicles, trailers and semi-trailers transporting passengers for hire or transporting property, and the money so collected is to be expended exclusively in the construction, maintenance and repair of public highways; if the state had granted franchises to private corporations or persons to construct public highways, then such corporations or persons are entitled to collect reasonable "tolls" for the construction, maintenance and repair of said public highways; the state may and has constructed improved public highways and has charged "tolls," as the charges in said subdivisions (b) and (c), as aforesaid, are "tolls."

In addition to the above decisions of the State Supreme Court, we will cite a few decisions of the U. S. Supreme Court and of other State Supreme Courts

which show that the charges in said subdivisions (b) and (c), as aforesaid, are "tolls."

This Court had occasion to pass on the question of the meaning and effect of the word "toll" in connection with a toll-bridge across a river. This Court held that turnpikes, railroads, bridges and ferries are public highways and the right to take toll is granted as compensation for erecting such works of internal improvement. The toll is a sum demanded for a passage on a highway, ferry, bridge, etc., and such toll can be demanded in consideration for such passage.

Comrs. of Dodge Co. v. Chandler, 6 Otto. 205, 24 L. Ed. 625.

The construction of a statute of Michigan, in which certain improvements had been made in the Manistee River so as to remove obstacles hindering the floating of logs and lumber, was involved. The respondent, the Improvement Company, brought an action against the plaintiff in error to recover tolls on such river. Mr. Justice Field, in delivering the opinion of the Court, said:

> "There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of the government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of the improvements and considerations of the return which such values or expenditures should yield. * * *
>
> "And to meet the cost of such improvement, the states may levy a general tax or lay a toll upon

all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. Huse v. Glover, 119 U. S. 543, 548 (30:487.)"

Sands v. Manistee River Improvement Co., 123 U. S. 288, 294, 31 L. Ed. 149, 151.

The Supreme Court again declared that tolls for passage through locks and the use of wharves and booms were compensation for the use of artificial facilities constructed. Citing *Huse v. Glover,* 119 U. S. 543, 548, 30 L. Ed. 487, 490; *Sands v. Manistee River Improv. Co.,* 123 U. S. 288, 297, 31 L. Ed. 149; also *Mobile County v. Kimball,* 102 U. S. 691, 26 L. Ed. 238.

Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 44 L. Ed. 400.

This Court held that the highways of the state, whether on land or by water, may be improved and a charge of a reasonable toll can be collected by the state as compensation for the use of such improved highways.

Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487.

In the absence of Congressional action, the State of Pennsylvania had the power, either itself or through a corporation which it chartered, to improve the navigation of the Monongahela River by means of tolls for the use of such improvement.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463.

In delivering the opinion Mr. Justice Hughes said:

> "While the state may not impose a duty of tonnage (citing cases), it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority."

Under such announcement a large number of cases were cited, to-wit: *Transportation Company v. Parkersburg,* 107 U.S. 691, 27 L. Ed. 584; *Huse v. Glover,* supra; *Sands v. Manistee River Im. Co.,* supra.

Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352, 405, 57 L. Ed. 1511, 1544.

Mr. Justice Reynolds, in delivering the opinion of this Court said:

> "In view of the many decisions of this Court there can be no serious doubt that where a state at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, the constitute no burden on interstate commerce. Parkersburg &. O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732; Huse v. Glover, 119 U. S. 543, 548, 549, 20 L. ed. 487, 490, 7 Sup. Ct. Rep. 313; Monongahela Nav. Co. v. United States, 148 U. S. 312, 329, 330, 37 L. ed. 463, 469, 13 Sup. Ct. Rep. 622; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 405, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, and authorities cited."

Hendrick v. Maryland, 235 U. S. 610, 624, 59 L. Ed. 385, 391.

In the *Hendricks* case, as well as the *Kane* case, the plaintiffs demanded protection under the Commerce Clause, and this Court held that the Commerce Clause would not protect them as the exactions were "tolls."

The Justices of Massachusetts rendered an opinion on a proposed license law. An excerpt of the opinion follows:

> "In the early days of the commonwealth many, if not most of the highways were built and maintained by private enterprise through turnpike corporations established by law and dependent for their support upon tolls charged to travelers. Bridges were built and maintained in the same way. Ferries were operated either in the same way or by municipalities, which collected tolls for their use. All highways and bridges, so far as we are aware, and some of the ferries, have been acquired by the commonwealth, or by counties, cities or towns. * * * The free use of all highways has been provided at the expense of the public treasury for many years in this commonwealth. This has not always been the custom. It is comparatively modern.
>
> "(2) The power of government to take, acquire or construct instrumentalities for public travel, to charge toll, rental or other recompense therefor is illustrated in several decisions. Commonwealth v. Wilkenson, 6 Pick. 175, 29 Am. Dec. 654; George G. Fox Co. v. Boston & Northern Street Railway, 217 Mass. 140, 142, 140 N. E. 356; Boston v. Treasurer and Receiver General, 237 Mass. 403, 414, 130 N. E. 390, and cases there reviewed.
>
> "If and so far as such tolls or rentals are based upon fair recompense for initial construction and for adequate maintenance, they do not involve the power for taxation. The power proposed to be

exercised in the present bill is not of that nature. Avowedly an excise tax is established. * * *

"Toll—at that time a word in common use in connection with turnpikes and bridges—thus was mentioned more than 100 years ago in the first decision requiring a critical consideration of the meaning of the word "commodities" in the Constitution as an illustration of an excise. * * *

" 'Toll' is the apt word to describe the collection of money for the use of a highway or bridge.

"(3, 4) There are appearances of inequality about a toll upon the use of highways by motor vehicles. The fact that no toll is charged for the use of highways by other kinds of vehicles bears a superficial likeness to discrimination against motor vehicles. It is a matter of common knowledge that the number of motor vehicles vastly exceed all others and that a different highway construction as to durability and smoothness is required for their convenience. * * *

"There is no general provision in the proposed bill for charging toll for motor vehicles owned by non-residents when used upon the highways of the commonwealth. That, too, may be found to be small in comparison with domestic use. * * *

"(5) A modern instance of the collection of toll by way of excise tax is found in G. L. C. 63 Par. S. 62-66, for the operation of street railways in public ways. Collector of taxes against Bay State Street Railway, 235 Mass. 330, 125 N. E. 614. The collection of a tax levy by way of tollage or license for the use of public ways by motor vehicles has been upheld in other jurisdictions. (In support of such announcement, a large number of cases were cited, including Kane v. New Jersey, supra; Pierce Oil Corporation v. Hopkins, supra; Standard Oil Co. v. Brodie, supra; Hendrick v. Maryland, supra; in re Ops. of the Justices of New Hampshire, supra.) * * *

"As a matter of abstract principle we are of opinion that it is within the constitutional power

of the General Court to levy an excise as a toll for the use of public ways by motor vehicles. * * *

"The proposed bill is a revenue measure. It is not exacted in the exercise of the police power. * * *

"(6) * * * An examination of the proposed bill plainly shows that it provides for an excise for the use of highways and not a property tax."

In re Ops. (Mass.), 250 Mass. 591, 146 N. E. 651. (Decided January, 1925.)

In the opinion the following excerpt is set out:

"When so empowered by the Legislature, requiring the payment of a property or reasonable graduated tax, as in the case at bar, which must be considered in the nature of a toll imposed for the exercise of the privilege of using the streets by the means of vehicle. In fact, the right of exacting the payment of such a license tax is akin to the principle by which the establishment of toll roads over public highways by virtue of legislative authority, and the right to collect toll from persons traveling in vehicles thereon, is sustained."

Tomlinson v. Indianapolis, 144 Ind. 142, 43 N. E. 9.

Again the Supreme Court of Indiana held that an ordinance of Terre Haute was a "toll" as the money collected under the license was expended to maintain and repair the streets. The Supreme Court held that the ordinance was a revenue measure.

Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469.

The Supreme Court of Indiana again held an ordinance was valid in which a licence fee was enacted

for the use of the streets by vehicle, and said charges were "tolls."

> "This requirement is consistent with reason and justice for it is a well recognized fact that it is the use of vehicles on the streets of a city which in the main cause the wear and tear of such streets, and the tax exacted is authorized and intended by the statute to reimburse the city, in part at least, for the great expense to which it is subjected in the maintenance and repair of its public streets."
>
> *Hogan v. Indianapolis,* 159 Ind. 523, 65 N. E. 525.

To the same effect:

A license fee charged and collected for the use of public highways by motor vehicles and the money received from such fees expended on such highways, is a "toll."

Re Hoffert, 34 S. D. 271, 148 N. W. 20;
Ex parte Kessler, 26 Idaho 764, 145 Pac. 113;
State v. Ingalls, 38 N. M. 211, 135 Pac. 1177.

We submit that said provisions of said subdivisions (b) and (c), as aforesaid, are "tolls."

III.

THE SAID SUBDIVISIONS (B) AND (C) OF SAID SECTION 77 OF THE "CALIFORNIA VEHICLE ACT," AS AMENDED, ARE REVENUE MEASURES, AND ARE NOT ENACTED AS POLICE MEASURES.

The lower Court in its opinion held:

> "For these reasons we are of opinion that the registration fee imposed by the state is a valid

exercise of the police power of state and violates no provisions of the Constitution of the United States. Whether the fee or tax imposed by the municipalities for like use is valid or not, we need not inquire because its validity is not questioned.

The decree or order heretofore entered granting a preliminary injunction, is therefore dissolved and the bill of complaint is dismissed for want of equity." (R. 16, 17, 18, 19.)

The lower Court filed and entered the order and decree; and said order and decree were based solely upon the reasons found in the said opinion. (R. 19, 20.)

We call attention of this Court to the admitted facts shown in the bill of complaint and the affidavit in support of the motion for interlocutory injunction.

Section 77 of the Act has been divided into different subdivisions. Subdivision (a) relates to the registration of every motor vehicle, trailer or semi-trailer, including electric vehicles, except exempted; subdivision (b) relates to the fees for electric vehicles and also that every such vehicle used for the transportation of passengers for hire, or for the transportation of property shall pay additional fees depending upon the weight; subdivision (c) relates to the additional fees for motor vehicles, including trailers and semi-trailers used for the transportation of passengers for hire or for the transportation of property according to the weight, and also that vehicles not equipped wholly with pneumatic tires shall pay twice the fees set forth in the table shown in subdivision (c). Section 159 permits not more than 25% of the moneys collected from the said registration and fees to be

used for the cost of regulation, including the maintenance of the Division of Motor Vehicles. (R. 3, 4, 5.)

The affidavit in support of the motion for the interlocutory injunction shows that more than $5,000,000.00 was collected from subdivision (a), and $2,668,000.00 from subdivision (b) and (c), and in addition the sum of $400,000.00 collected from chauffeurs' and operators' licenses, during the year of 1928. Not more than 25 per cent of said moneys so collected as aforesaid could be used for regulation and cost. That more than $6,000,000.00 is to be used as provided by Section 159, namely, for construction, maintenance and repairs. (R. 9, 10.)

The Supreme Court has interpreted the meaning of subdivisions (b) and (c), as aforesaid, as being revenue measures.

Old Homestead Bakery v. Marsh, supra.

The lower Court failed to give any value to the interpretation of said subdivisions made by not only the Supreme Court in the *Old Homestead Bakery* case, but also the decision in the *Matter of the Application of Schuler,* supra. The Federal Courts are bound by the interpretation of the meaning of said subdivisions.

Hanover F. Ins. Co. v. Carr, 272 U. S. 179, 71 L. Ed. 224.

Apply the principle announced by the State Supreme Court in the above cases.

It is admitted that not a cent collected from said provisions of said subdivisions (b) and (c) is to be used for the cost of regulation, including the cost of

the Motor Vehicle Division, as all of the money so collected, as aforesaid, is used in the construction, maintenance and repair of the state highways and the county roads, all of which have been constructed or reconstructed under the Federal Aid Legislation and have received Federal money therefrom. Therefore said subdivisions (b) and (c) cannot be sustained under the state police power.

This Court had before it the question of whether an ordinance exacting a license fee of $50.00 on every motor vehicle transporting passengers for hire using the streets of South Bend, Indiana, was based upon police powers of the state, or not. The State Supreme Court had sustained the validity of the ordinance under the state police power.

In delivering the opinion of the Court, Mr. Justice Brandeis said:

> "It is true that, in the absence of Federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expenses of administrating the regulations may be demanded. Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140; Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222, 37 Sup. Ct. Rep. 30; Morris v. Duby, 274 U. S. 135, 71 L. Ed. 966, 47 Sup. Ct. Rep 548; Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 Sup. Ct. Rep. 702. Compare Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091, 47 Sup. Ct. Rep. 632. These powers may also be exercised by a city if author-

ized to do so by appropriate legislation. Compare Erb v. Morash, 177 U. S. 584, 585, 44 L. Ed. 897, 898, 20 Sup. Ct. Rep. 819; Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 99, 63 L. Ed. 863, 868, 39 Sup. Ct. Rep. 428. Such regulations rest for their validity upon the same basis as do state inspection laws, Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. Ed. 191, 18 Sup. Ct. Rep. 862; Red "C" Oil Co. v. Board of Agriculture, 222 U. S. 380, 56 L. Ed. 240, 32 Sup. Ct. Rep. 152, and municipal ordinances imposing on telegraph companies, though engaged in interstate commerce, a tax to defray the expense incident to the inspection of the poles and wires. Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. Ed. 240, 23 Sup. Ct. Rep. 204; Postal Teleg-Cable Co. v. Richmond, 249 U. S. 252, 258, 63 L. Ed. 590, 594, 39 Sup. Ct. Rep. 265; Mackay Teleg. & Cable Co. v. Little Rock, supra. But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such purpose. It follows that the exaction of the license fee cannot be sustained as a police measure. Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 164, 47 L. Ed. 995, 999, 23 Sup. Ct. Rep. 817; Postal Teleg. Cable Co. v. New Hope, 192 U. S. 55, 48 L. Ed. 338, 24 Sup. Ct. Rep. 204; Barrett v. New York, 232 U. S. 14, 32, 58 L. Ed. 483, 491, 34 Sup. Ct. Rep. 203; compare D. E. Foote & Co. v. Stanley, 232 U. S. 494, 503, 58 L. Ed. 698, 701, 34 Sup. Ct. Rep. 377."

Sprout v. South Bend, 277 U. S. 163, 72 L. Ed. 529.

The State Supreme Court of Washington held that a license law was based upon the state police power.

This Court reversed the decree on the ground that the license law was in the nature of an inspection law, and, as the cost of regulation was only about 25 per cent of the money collected, the law could not be sustained under the police power.

Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. Ed. 668.

We submit that said subdivisions (b) and (c), as aforesaid, cannot be sustained under the state police power. The question is whether said subdivisions can be sustained as revenue measures against the appellants and all others similarly interested or situated.

IV.

ALL CITIES ARE EMPOWERED BY THE STATE CONSTITUTION AND HAVE ENACTED LICENSE ORDINANCES COMPELLING OWNERS OR OPERATORS OF MOTOR VEHICLES USED IN TRANSPORTING PASSENGERS FOR HIRE OR PROPERTY TO PAY IN ADVANCE LICENSE FEES BEFORE USING THE STREETS THEREOF. THE CHARGES ARE "TOLLS."

Section 11 of Article XI of the Constitution of the State of California reads as follows:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

Also Section 12, Article XI, is as follows:

> "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by

> general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Under such powers the cities have enacted ordinances compelling the owners or operators to pay in advance license fees before they can use the streets of said cities by their motor vehicles transporting passengers for hire or property.

> *Bacon Service Corporation v. Huss,* 199 Cal. 21, 30;
> *In re Schmolke,* 199 Cal. 42, 47.

In enacting the "California Vehicle Act," the Legislature had in mind said above provisions of the Constitution when it adopted Section 145 of said Act which provided:

> "Sec. 145. Nothing in this Act contained shall be so construed as to prevent * * * and the legislative bodies of incorporated cities from providing by ordinance for the regulation of traffic * * *, nor from licensing and regulating the operation of vehicles offered to the public for hire," etc.

It is admitted that all the cities have passed ordinances exacting license fees on motor vehicles, trailers and semi-trailers transporting passengers for hire or property using the streets of said cities, and said fees must be paid in advance before using said streets. Said fees are in addition to the charges exacted under the provisions of said subdivisions (b) and (c) of said Section 77, as aforesaid. The fees charged by said cities vary from $5.00 to $42.00 per motor vehicle, trailer and semi-trailer, depending upon the city.

Said ordinances were enacted for the purpose of regulating said motor vehicles, trailers and semi-trailers, and also for revenue. Not less than 75 per cent of the money so collected from said fees has been and in the future will be applied to the maintenance and repair of said streets in said cities. (R. 5, 6.) Said charges as exacted by said ordinances of said cities, are "tolls."

We refer to our argument and the citations found in paragraph II of our brief in support of our position that said charges are "tolls."

V.

THE SAID SUBDIVISIONS (B) AND (C) OF SECTION 77 OF SAID "CALIFORNIA VEHICLE ACT," AS AMENDED, COMPELLING THE APPELLANTS AND ALL PERSONS, FIRMS, ASSOCIATIONS AND CORPORATIONS SIMILARLY INTERESTED OR SITUATED TO PAY SAID CHARGES ARE UNCONSTITUTIONAL AND VOID, BEING CONTRARY TO AND IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

Said subdivisions (b) and (c) of Section 77 of the "California Vehicle Act," being Chapter 226, Statutes of 1923, as amended by Chapter 844, Statutes of 1927, cannot be sustained under police power. We refer to the facts and the authorities on that question in paragraphs II and III.

Said provisions of said subdivisions cannot be sustained as excise taxes for the use of the cities' streets.

This Court has decided this question by the following excerpt of the decision in *Sprout v. South Bend:*

"It is true that a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways, Hendrick v. Maryland, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140; Interstate Busses Corp. v. Blodgett, No. 197, decided February 20, 1928, (U. S., ante, 243, 48 Sup. Ct. Rep. 230.) And this power may be delegated in part to a municipality by appropriate legislation. Compare St. Louis v. Western Union Tel. Co., 148 U. S. 92, 98, 37 L. Ed. 380, 383, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. Ed. 810, 13 Sup. Ct. Rep. 990. An exaction for that purpose may be included in the license fee. Hendrick v. Maryland, supra; Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. Ed. 222, 227, 228, 37 Sup. Ct. Rep. 30; Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 Sup. Ct. Rep. 702. But no part of the license fee here in question may be assumed to have prescribed for that purpose. A flat tax substantial in amount and the same for busses plying the streets continually in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as the measure of the cost or value of the use of the highways, and there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets. Compare Tomlinson v. Indianapolis, 144 Ind. 142, 36 L. R. A. 414, 43 N. E. 9; Terre Haute v. Kersey, 159 Ind. 300, 95 Am. St. Rep. 296, 64 N. E. 469; Hogan v. Indianapolis, 159 Ind. 523, 65 N. E. 525.

It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise tax for the use of the streets of the city."

Sprout v. South Bend, supra.

Apply the principle announced by this Court in the above case to the admitted facts shown in the record in this case.

The record shows that the appellants and all said others similarly interested or situated have paid under subdivision (a) all of the exactions and the defendant is enforcing that subdivision; the defendant will collect more than $6,000,000.00 for the year 1929 from said subdivision (a). The appellants and said others will pay during the year 1929 about $4,000,000.00 under the provisions of subdivision (b) and (c). The entire cost for regulation for that year may not be more than $2,000,000.00. The said $4,000,000.00 will be expended exclusively on Federal Highways for construction, maintenance and repairs, and the money is not expended on the construction, maintenance and repair of the streets of cities. The appellants and said others do not use any highway by their motor vehicles, but use exclusively the streets of said cities by their motor vehicles. The cities are compelled to pay for the construction, maintenance and repairs of their streets and in order to create a fund to aid in said work have passed ordinances in the nature of license fees exacting charges on every motor vehicle using the streets transporting passengers for hire or property. The money collected therefrom is used for the cost of regulation and for construction, maintenance and repairs on said streets. The appellants and said others have and will be compelled to pay said exactions to said cities before they can use their motor vehicles on said streets.

The total amount of the money collected under said subdivisions (b) and (c) will be used for the construction, maintenance and repair of the highways outside of the limits of cities. The said exactions under said subdivisions were not "designed as the measure of the cost or value of the use of the highways."

In the decision we found the following cases cited, to-wit: *Hendricks v. Maryland, Kane v. New Jersey, Tomlinson v. Indianapolis, Terre Haute v. Kersey* and *Hogan v. Indianapolis.*

We have already cited these cases to show that said exactions were tolls and could not be sustained under the police power. We refer our argument and citations found in paragraphs II and III.

The opinion of this Court in the *Sprout* case declared that the exactions therein were not an occupation tax. The exactions under said subdivisions (b) and (c) cannot be sustained as occupation taxes.

Prior to the enactment of the Federal Aid Legislation this Court has held that non-residents must pay reasonable excise taxes in the shape of registration fees before they might use the highways by their motor vehicles. These fees were to cover the cost of regulation and a reasonable charge to cover the cost of the maintenance and repair of said highways made necessary by the wear of such highways by the motor vehicles of said non-residents; that said reasonable exactions were not in violation of the Commerce Clause.

If said exactions of said subdivisions (b) and (c) can be held to be occupation taxes then Hendrick and Kane would have been protected.

The appellants and said others do not carry on any business by their motor or other vehicles on any highways outside of the limits of the cities and pay to said cities vehicle license taxes enacted under ordinances of said cities which are "tolls." As shown by the admitted facts the appellants and said others cause no damage to highways outside said cities as their vehicles do not use such highways; all of the money collected under the provisions of said subdivisions (b) and (c) is spent for the maintenance and repair of highways outside of said cities.

The said subdivisions (b) and (c) are also in violation of the said 14th Amendment. As is admitted, the appellee will collect the said exactions from the appellants and said others before they can use their vehicles on the streets of the cities in transporting passengers for hire or transporting property. No benefit whatsoever is to be derived from the money which is collected as far as said appellants and said others are concerned. Said appellants and said others do receive direct benefits derived from the license fees charged by the said cities. The said provisions of said subdivisions (b) and (c) and the provisions of said city ordinances are alike. Their sole purpose is to obtain money for the purpose of constructing, maintaining and repairing the highways outside of the limits of cities, and for the construction, maintenance and repair of streets in said cities.

Those provisions of both the said subdivisions and the city ordinances are "tolls." (See our Brief Paragraphs II, III and V.) This Court in the Sprout case cited the case of *St. Louis v. Western Union Teleg. Co.,* 148 U. S. 92, 37 L. ed. 380, on the question of an excise tax.

The Telegraph Company attacked an ordinance requiring the company to pay a license fee for every telegraph pole in the streets of St. Louis. This Court held that the charge so made could be obviated by the Company if they would not use the streets, by their poles if they placed their poles on private property.

In delivering the opinion of the Court Mr. Justice Brewer said:

> "The amount to be paid is not graduated by the amount of the business, nor is it a fixed sum for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.' Philadelphia & R. R. Co. v. Pennsylvania (State Freight Tax Case), 82 U. S. 15 Wall 232, 278, (21:146, 162.) If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it * * * That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section."
>
> *St. Louis v. Western Union Teleg. Co.,* 148 U. S. 92, 37 L. ed. 380.

In the instant case the appellants and said others have never and will not use the public highway outside the limits of cities. Under the principle announced in the above and other cases we are entitled to the protection of the 14th amendment.

This Court had before it a suit involving the distinction between a toll and a tonnage impost. The City of Chicago passed an ordinance requiring tug boats operating in the Chicago River to obtain licenses. The plaintiff below paid the sum of $300.00 for licenses for 12 steam tugs.

The only defense presented to the Court was that such fees were charged and collected as compensation for benefits conferred in providing an improved waterway, and that said payments were made as tolls exacted as a reasonable compensation for such improvements. Your Court cited the following cases, *Huse v. Glover,* 119 U. S. 543 (30:487), and *Sands v. Manistee River Imp. Co.,* 123 U. S. 288 (31:149), in which cases this Court declared that such cases showed that the said license fee was not to be classed as a toll for the reason that the Chicago River, although it had been deepened from time to time, furnished no benefits for the operation of such tugs on such river, and that no such compensation could be assessed as a toll for the use of such artificial improvements. And in the opinion of the Court delivered by Mr. Justice Field, it is said:

> "The attempt is made to assimilate the present case to those cases from the fact that it is conceded that the Chicago River is from time to time deepened for navigation purposes by dredging

> under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expense of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen nor can arise to the tugs in question by the alleged deepening of the river."
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> *Harmon v. Chicago,* 147 U. S. 396, 408, 409, 37 L. ed. 216, 221, 222.

As is seen in the instant case the appellant and said others do not receive any benefit, although they will be compelled to pay the tolls provided for under said subdivisions (b) and (c).

The Supreme Court of California has interpreted two acts of the Legislature of California. The said two acts made two classes, one relating to operations of motor vehicles on the highways outside of the limits of the cities, and the other two relating to operations of motor vehicles inside of the limits of the cities.

The first act was passed at the same time in 1923 as the "California Vehicle Act." This act is so called Motor Vehicle Transportation License Tax, being Chap. 341 of the Statutes of 1923.

In the opinion of the Court delivered by Justice Shenk we find the following:

> "As indicated by its title, the act was designed to impose a license tax upon those engaged in the business of operating motor vehicles upon the public highways for the transportation of persons or property for compensation. * * *
>
> "An examination of the entire statute discloses that the obvious and only purpose of the act was

to provide a revenue with which to maintain and repair the public highways of the state outside of incorporated cities, and that such revenue was to be obtained by the imposition of a license or privilege tax on the business of operating motor vehicles for hire over such public highways. The act is not a police measure in any sense. It provides for license tax for revenue purposes only."

Interpreting Section 8, the opinion said:

"The license taxes here imposed by the Legislature are in furtherance of a state purpose for the maintenance of state highways and to extend aid in the maintenance of county highways."

Interpreting Section 9, relating to exemptions of certain classes of vehicles, the following is found in the opinion:

"It is apparent that this exemption and the further exemption * * * were intended to apply to those who are engaged in the business of operating motor vehicles for hire within the limits of incorporated cities. As such, they may be properly so separatedly classified for the reason that highways within the municipality are usually not maintainable directly at the expense of the state but from municipal revenues derived from the exercise of municipal powers of license and taxation, and it must be assumed that the Legislature had this distinction in mind in limiting the license to the use of highways maintainable by the state and for whose maintenance the municipalities are not responsible.

* * * * * * *

We therefore conclude * * * the remainder of the act is a completely enforceable statute as to all operators engaged in the business of using the public highways of the State outside of municipalities for transportation of persons or property for hire."

Bacon Service Corp. v. Huss, 199 Cal. 21, 248 Pac. 235.

The Legislature enacted an amendment of said act being Chap. 412, Stat. of 1925.

The Supreme Court again interpreted said act and the amendment. We set out the following excerpt in the opinion delivered by Justice Shenk:

> "It is thus made plain that it was the intention to exact the license fee from those only who use the public highways outside of incorporated cities in the conduct of their business and that as to those whose business is operating exclusively within such cities the license is not required, this on the theory that the latter are or may be called upon to respond to a license tax or other exaction imposed for like purposes by the municipality itself, and that as to those operating both within and without incorporated cities they should receive a credit in their state license tax for whatever amount they are required to pay as county and municipal licenses and taxes. There would seem to be nothing unfair or unjust in the license plan thus laid out by the statute. We are of the opinion that the exemptions and classifications provided for in section 9, when read in conjunction with the rest of the act, do not amount to arbitrary action or unlawful discrimination on the part of the legislature."
>
> *In re Schmolke,* 199 Cal. 42.

In other words, the appellants and said others have paid the fees to the cities and do not use the highways outside of the limits of the cities.

Said subdivisions (b) and (c), as aforesaid, violate the 14th Amendment.

Moreover, the said subdivision (c), as aforesaid, violates the 14th Amendment.

Section of 77 of the "California Vehicle Act" of 1923 provided:

"For each such vehicle weighing, when unladen, less than 3000 pounds.....$10.00

As is seen, the Legislature had in 1927 struck out any fees if the motor vehicle, trailer and semi-trailer weighed unladen, less than 3000 pounds. There is no limit to any any weight of vehicle and load, if the motor vehicle, trailer and semi-trailer only weigh, unladen, less than 3000 pounds.

The admitted facts show (R. 23, 24, 26, 27) that there are many thousands of such vehicles which are used in transporting passengers for hire or transporting property; that the appellants and said others are in direct competition with the said owners and operators of vehicles which do not pay said exaction under said subdivision (c), even though said vehicles carry more than 6000 pounds. The appellants and said others have been and will be daily irreparably damaged by said vehicles, as they are engaged in the same class of business as the appellants and said others.

The said subdivision (c) violates the 14th Amendment. We cite a few cases showing that subdivisions (b) and (c) or (c) are contrary to and in violation of the 14th Amendment.

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such protection is denied when upon one of the two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon

the other * * *. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

Cotting v. Goddard, 183 U. S. 79, 46 L. Ed. 92, 111.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this Court in Barbier v. Connolly, 113 U. S. 27, 28 L Ed. 923, 924, 5 Sup. Ct. Rep. 357, of the equality clause said: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment.' In Hayes v. Missouri, 120 U. S. 68, 30 L. Ed. 578, 7 Sup. Ct. Rep. 350, the court speaking thru the same justice, said the 14th Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however, limited, of a personal property right, is just as clearly a denial of equal protection of the laws of the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124.

"The gross receipts of incorporated operators are taxed while that of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirements that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Mfg. Co. v. Saunders, supra. No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis."

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. Ed. 609.

We submit that said subdivisions, as aforesaid, are unconstitutional; and the appellants and said others are entitled to the protection of the 14th Amendment prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens, or which shall deprive any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws.

VI.

The Said Provisions of Said Subdivisions (b) and (c) of Said Section 77 of the "California Vehicle Act" are Contrary to and in Violation of the Constitution of California.

We refer to our argument and citations in pars. II, III, IV and V in our brief, showing that the provisions of said subdivisions (b) and (c), as aforesaid, are unconstitutional.

In addition we cite the following provision of the state constitution, being Article I, Section 21:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

Said exactions under said subdivisions (b) and (c) are "tolls." The appellants and said others are compelled to pay "tolls" on highways which they never use, while others receive the benefits of said money collected from the appellants and said others.

The said exactions are "taxes" imposed by the provisions of Section 12 of Article XI, supra.

People v. Martin, 60 Cal. 153.

Such use of the streets of a city by delivery wagons of a business enterprise, as would be merely occasional and incidental to a business conducted elsewhere than within its boundaries, would not be the proper subject of taxation by such city and the license law offends Section 12 of Article XI.

The Emporium v. San Mateo, 177 Cal. 624.

To the same effect:

In re Hart, 36 Cal. App. 627;
Matter of Hines, 33 Cal. App. 45;
Matter of Application Smith, 33 Cal. App. 161;
Town of St. Helena v. Butterworth, 198 Cal. 230.

The said provisions of subdivision (c) are unconstitutional.

When the Legislature amended Section 77 in 1927 by eliminating the provision requiring all motor vehicles, trailers and semi-trailers weighing, unladen, less than 3000 pounds, to pay the exaction, namely, $10.00, as provided for under subdivision (c), it violated said Section 12 of Article XI, as there are many thousands of vehicles which have been granted said privileges and immunities. We have previously shown what the admitted facts are in our brief.

The whole of said subdivision (c) must be held unconstitutional, as there is no provision in said subdivision which can force the owners or operators to pay any exaction if their vehicles are less than 3000 pounds in weight, unladen.

> "In Hellman v. Shoulters the court says: "It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one—and that the requirement of uniformity is satisfied, if it applies to all of the class alike. The word 'uniform' in the constitution does not mean 'universal.' The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same." The classification, however, is not a

proper one for distinct legislation, if it is not founded upon some natural, intrinsic, or constitutional distinction, a distinction which bears some relation to, or furnishes cause for, the particular legislation embraced in the act. (Pasadena v. Stinson, 91 Cal. 251, (27 Pac. 604); Darcy v. Mayor, 104 Cal. 645, (38 Pac. 500); Bruch v. Comombet, 104 Cal. 351, (38 Pac. 45); Rauer v. Williams, 118 Cal. 401, (50 Pac. 6911); Budd v. Hancock, 66 N. J. L. 135, (48 Atl. 1023); 26 Am. & Eng. Ency. of Law, 2d ed., 683.) Upon this subject the Supreme Court of the United States has said that the State, 'in prescribing regulations for the conduct of trade, cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity,' and that it cannot discriminate 'by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom discriminates.' (Connolly v. Union Sewer Pipe Co., 184 U. S. 563, (22 Sup. Ct. 440.) This was said with respect to a law prohibiting combinations between persons engaged in trade, but exempting from its provisions farmers and stockraisers."

Ex Parte Sohncke, 148 Cal. 262, 267.

"The interest of the petitioners in this proceeding consists in the fact that they are themselves engaged in the business of transportation of property as common carriers for compensation operating over the same routes which are followed by the truck operators referred to in the petition. Petitioners are operating under certificates

of public convenience and necessity obtained from the Railroad Commission, are subject to all of the regulations of the Commission, and by reason of the failure of the Commission to act in the premises petitioners are subject to the unrestricted and unregulated competition of those other truck operators. Petitioners contend that the amendment of 1923 is violative of sections 11 and 21 of Article I of the Constitution of this State and of the fourteenth amendment to the Federal Constitution, in that it makes an arbitrary classification and distinction not based upon any natural, intrinsic or constitutional ground of classification. In short, their contention is that the amendment which purports to exempt from the regulations of the act those transportation companies which are engaged in hauling the products and implements of husbandry constitutes an unreasonable, unjust and unlawful discrimination in favor of those transportation companies and against these petitioners * * *. The question, therefore, is whether or not the exemption created by the proviso of 1923 constitutes a lawful classification. Concededly the classification here made does not rest upon a constitutional distinction, and some natural or intrinsic distinction must therefore be found as a basis for it. * * * It is equally well settled that a statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a large number of persons all of whom stand in the same relation to the privileges granted and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other (5 Cal. Jur. 825, and cases cited). What reasonable ground of distinction is there between a common carrier engaged in the business of hauling various kinds of freight, including products and implements of husbandry, by motor truck over a regular route upon the public highway and another

common carrier engaged in the business of hauling freight which consists solely of the products and implements of husbandry by motor truck over the same route, which justifies the subjection of the one to the regulations imposed by the Auto Stage and Truck Transportation Act, and the exemption of the other from the burden of those regulations? * * * Assuming, however, that the provision in question was designed for the benefit of the farmers and that it may conceivably so operate, the weight of authority is to the effect that it is an unwarranted discrimination. A closely similar question came before the Supreme Court of the United States involving the validity of the Illinois Anti-Trust Law of 1893 (Ill. Laws 1893, p. 182), which prohibited a combination of capital, skill, or acts, of two or more persons, etc., to create or carry out restrictions in trade, to limit production or increase or reduce prices or prevent competition, and which contained a proviso that 'The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser.' That court, after an exhaustive consideration of the case, held the statute invalid solely upon the ground that the exception in favor of the farmers was an unreasonable and unwarranted discrimination, violative of the fourteenth amendment. In the course of its opinion the court observed, 'that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may for their benefit exclusively control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful.' (Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. Ed. 679, 22 Sup. Ct. Rep. 431, see, also Rose's U. S. Notes.) * * *. We do not mean to infer that every classification based upon a distinction between farmers on the

one hand and all other persons on the other is unconstitutional, but we are impelled to conclude that no natural, intrinsic or constitutional distinction is to be found as a basis for the exemption of the transportation companies described in the 1923 amendment, supra, from the regulations prescribed in the Auto Stage and Truck Transportation Act, and that such attempted exemption is violative of the fourteenth amendment to the federal constitution and of like provisions in our state constitution. It is not claimed, and in view of the legislative history of the act could not be claimed, that the provisions of this exception are so intimately and inherently related to and connected with the general provisions to which it relates as to invalidate the latter."

Franchise Motor Freight Assn. v. Seavey, 196 Cal. 77, 80, 81, 82, 85.

The exemption in the Act of 1923 (Stats. 1923, p. 706) of sight-seeing motor busses carrying passengers for hire and operating outside of municipalities and the exemption of the entire revenues of operators a part but not all of whose business embraces the carriage of the United States mail and parcels post by contract, are not based on any properly recognizable theory of classification; and such exemptions attempt to confer special privileges and immunities upon operators of such sight-seeing busses and mail and parcels post contract carriers in violation of Section 21 of Article I of the Constitution, and are therefore void.

Bacon Service Corporation v. Huss, supra.

The above citation shows conclusively that said subdivision (c) is unconstitutional, and the appellants and said others are entitled to the protection of

the said Section 21 of Article XI of the State Constitution.

We cite a late decision of this Court which shows that the Federal Courts will construe the said State Constitution.

> "Its jurisdiction thus established gave the district court the authority to determine all questions involved, including questions of state law, irrespective of the disposition of the Federal question; and as the relief to which the complainant might be entitled would be the same as that which should be allowed him by the Federal Court upon a construction of the State Constitution and laws such as he contends for, the question whether the acts complained of violated the Federal Constitution need not be decided." (Citations.) "It follows therefore, that in both the cases under consideration, the district court has jurisdiction to consider and decide whether the complainants in those cases are so injured by a violation of the State Constitution and laws in the taxation of their property as to entitle them to the equitable remedy of injunction against the taxing officials made defendants."
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> *Chicago Great Western R. Co. v. Kendall*, 266 U. S. 96, 97; 69 L. Ed. 188, 189.

VII.

THE LOWER COURT ERRED IN DENYING THE APPLICATION TO FILE AND PRESENT THE AMENDED BILL OF COMPLAINT AFTER IT HAD FILED ITS WRITTEN OPINION.

As is shown, immediately after the lower Court had filed its decision, the appellants immediately filed a motion accompanied by a proposed amended bill of

complaint, so as to show more in detail and to obviate the decision that was based upon police power.

We followed equity rule 19. The lower Court did not pass directly upon whether or not said amended bill of complaint should be filed and presented, but entered an order refusing to set aside the order and decree.

We included in the transcript of the record certain paragraphs of the said proposed amended bill of complaint. This Court has before it the matters contained in said proposed bill and this Court can examine said matters in connection with the averments of the original bill of complaint.

We consider that this Court has the power to base any decision it may reach upon the entire record, as it would be idle to reverse the decree and order by reason of the failure of the lower Court to take jurisdiction over said proposed bill of complaint.

VIII.

THE ACTIONS OF THE APPELLEE IN ENFORCING SAID UNCONSTITUTIONAL AND VOID SUBDIVISIONS (B) AND (C) OF SECTION 77 OF THE "CALIFORNIA VEHICLE ACT," AS AMENDED, ARE ILLEGAL, BEING CONTRARY TO AND IN VIOLATION OF THE 14TH AMENDMENT, AND ALSO THE CONSTITUTION OF CALIFORNIA.

Under this paragraph we call attention to the Court of our argument and citations showing that said subdivisions (b) and (c), as aforesaid, are unconstitutional. Therefore, said appellee is illegally acting in collecting said exactions from the plaintiffs and all

persons, firms, associations, and corporations similarly interested or situated.

IX.

THE APPELLANTS ON BEHALF OF THEMSELVES AND FOR ALL OTHERS SIMILARLY INTERESTED OR SITUATED ASK FOR RELIEF BY INJUNCTION ENJOINING AND RESTRAINING SAID APPELLEE FROM ENFORCING SAID SUBDIVISIONS (B) AND (C), AS AFORESAID.

The admitted facts show that said appellee has continued to enforce said subdivisions after the lower Court had dissolved the said preliminary injunction, and he will continue to so act against said appellants and said others to their irreparable damage and loss. Every day said appellants and all said others are being irreparably damaged by the said competition by owners and operators who have not been and will not be compelled to pay said exactions under said subdivisions.

We therefore submit that said appellants and said others should be protected by proper order.

X.

THE SAID ORDER AND DECREE OF THE LOWER COURT SHOULD BE REVERSED BY THIS HONORABLE COURT.

We submit that this Honorable Court should reverse the said order dissolving the said preliminary injunction and granting the motion to dismiss, and also the decree of said lower Court.

We pray this Honorable Court direct the lower Court a final decree declaring the said subdivisions (b) and (c) of said section of said "California Vehicle Act," being Chap. 266, Stats. of 1923, as amended by Chap. 844, Stats. of 1927, are unconstitutional and the said appellee, Frank G. Snook, as Chief of the Division of Motor Vehicles, be forever enjoined and permanently restrained from enforcing the said unconstitutional subdivisions (b) and (c); and further, this Honorable Court shall direct the said lower Court to command the said appellee to account all of the moneys collected by him under the said subdivisions (b) and (c) and pay the sum so found into the registry of said Court; and further to permit any allowances, distributions and payments as may be thereafter determined, awarded and decreed; and further, this Honorable Court shall issue any order or orders it may deem proper and fit in the premises or for any other or proper relief.

Dated, San Francisco,
September 21, 1929.

Respectfully submitted,
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J. F. VIZZARD,
EDWIN C. EWING,
Solicitors for Appellants.